No. 02-19-00410-cv

In the Court of Appeals for the Second District Fort Worth, Texas

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RAWNDA DRAPER, MARK SCOTT, MEGAN SCOTT, JEREMY FENCEROY, AND BRADLEY HERBERT,

Appellants,

v.

CITY OF ARLINGTON, TEXAS AND W. JEFF WILLIAMS, MAYOR OF THE CITY OF ARLINGTON,

Appellees.

On Appeal from the 67th Judicial District Court
of Tarrant County, Texas
Cause No. 067-310481-19

BRIEF OF AMICUS CURIAE TEXAS ASSOCIATION OF REALTORS IN SUPPORT OF THE APPELLANTS

JONATHAN F. MITCHELL
State Bar No. 24075463
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940 (phone)
(512) 686-3941 (fax)
jonathan@mitchell.law

Counsel for Amicus Curiae

Identity of Parties and Counsel

The identity of the parties to this appeal and their counsel are correctly set forth in their respective briefs. Amicus curiae is:

Texas Association of Realtors

Amicus curiae is represented by:

Jonathan F. Mitchell
State Bar No. 24075463
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940 (phone)
(512) 686-3941 (fax)
jonathan@mitchell.law

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Issues Presented

The Texas Association of Realtors adopts the "Issue Presented" set forth in the Appellants' Brief on the Merits.

Interest of Amicus Curiae

The Texas Association of Realtors is a membership association composed of over 120,000 realtors. It is the largest professional membership association in Texas. The Texas Association of Realtors is committed to advocating for a strong real estate industry and protecting the constitutional rights of property ownership.

Source of Fee

The Texas Association of Realtors is paying all fees incurred in preparing this brief.

Statement of Facts

On April 23, 2019, the city of Arlington enacted Ordinance 19-014 and Ordinance 19-022. Ordinance 19-014 outlaws "short-term rentals" throughout the city unless they fall within a designated "STR Zone." A "short-term rental" is defined as:

> A residential premise, or portion thereof, used for lodging accommodations for occupants for a period of less than thirty (30) consecutive days. The definition of Short-term Rental does not include a Bed and Breakfast as defined in the Unified Development Code.

See Appellants' Br. Tab 2. And the "STR Zone"—the only place where short-term rentals are permitted in the city of Arlington—is defined in the the ordinance as:

> A geographically contiguous area, extending approximately one mile from Arlington's entertainment hub, that is bounded on the north by E. Lamar Blvd., on the west by Center Street, on

> the south by E. Abram Street, and on the east by southbound State Highway 3 60 frontage road.

See Appellants' Br. Tab 2. Ordinance 19-014 also requires any landlord that wishes to operate his property as a short-term rental to obtain an annual permit from the city. *See id.* Violations of Ordinance 19-014 are punishable as a misdemeanor offense, and violators will be fined no more than $2,000. *See id.*

Ordinance 19-022 imposes numerous restrictions on the landlords and tenants that lease or occupy short-term rentals within the city-designated zone. It restricts the number of occupants in a short-term rental to no more than twelve at a time, regardless of the size of the dwelling. *See* Ordinance 19-022 § 3.12. It forbids the occupants of a short-term rental to park their cars on any nearby residential street. *See* Ordinance 19-022 § 3.13. And it categorically prohibits an owner from converting or renovating his property in a manner that would add bedrooms for use as a short-term rental. *See* Ordinance 19-022 § 3.15.

The plaintiffs are homeowners in Arlington who occasionally rent their property (or rooms and common areas within their home) to tenants on a short-term basis. Plaintiff Rawnda Draper rents the spare bedrooms and common areas of her home. CR5. Plaintiffs Mark and Megan Scott own three properties in Arlington that they lease to short-term renters. CR 6–7. Plaintiff Jeremy Fenceroy owns a home in Arlington with extra bedrooms, which he leases to short-term guests through Airbnb. CR 8. And plaintiff

Bradley Herbert own two houses in Arlington that he rents on a short-term basis. CR 9. Each of the plaintiffs is challenging the constitutionality of Ordinance 19-014 and Ordinance 19-022, and each of them seeks declaratory and injunctive relief against their enforcement. The district court, however, denied the plaintiffs' motion for temporary injunction, CR 74, and the plaintiffs have appealed that ruling, CR 76–78.

Argument

The city's restrictions on short-term rentals violate the rights of property ownership protected by due-course-of-law clause. The right of property ownership encompasses the prerogative to use, lease, or dispose of one's property as the owner sees fit. *See Buchanan v. Warley*, 245 U.S. 60, 74 (1917) ("Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property."). And this is a "fundamental" right under the due-course-of-law clause, as it is deeply rooted in this nation's history and tradition. *See Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

This is not to suggest that the rights of property ownership are absolute, or that any constraint on the use of property violates the due-course-of-law clause. The rights of property ownership are subject to the state's police powers, *see Buchanan*, 245 U.S. at 74, and it is entirely constitutional for the city to regulate short-term rentals with an aim toward preventing nuisances or other activities that violate the rights of neighboring landowners. But the

city must appropriately tailor the use of its police powers, and it must ensure a proper fit between the means employed and the ends that the city hopes to achieve. The city's ordinances, however, adopt a blunderbuss approach and sweep far beyond what is necessary to accomplish the city's purported interests.

The due-course-of-law clause prohibits cities from regulating short-term rentals in a manner that is "unreasonably burdensome" and "oppressive in relation to the underlying governmental interest." *See Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 87 (Tex. 2015). And there are at least two features of the city's ordinances cannot pass muster under this constitutional standard. First, the city's complete and total ban on short-term rentals outside a city-defined zone goes far beyond what is necessary to prevent nuisance or protect the rights of neighboring landowners, and there is nothing in the record to suggest that an extreme and sweeping measure of this sort is necessary to protect the health, safety, or morals of city residents. Second, the city's decision to prohibit homeowners from adding new bedrooms to their property for short-term rentals does not advance any conceivable governmental interest when the city simultaneously permits large houses within the city-approved zone to allow up to 12 people to stay in any one building during a short-term rental.

I. The City's Decision To Categorically Prohibit Short-Term Rentals Outside A City-Defined Zone Is Unreasonably Burdensome And Oppressive In Relation To The Underlying Governmental Interest

The constitutional test for the city's ordinances is set forth in *Patel*:

> [T]he standard of review for as-applied substantive due course challenges to economic regulation statutes [is] whether the statute's effect as a whole is so unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest.

Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 87 (Tex. 2015). Ordinance 19-014, which categorically outlaws short-term rentals in Arlington outside a city-defined "STR Zone," cannot pass muster under this standard. Whatever concerns the city may have for protecting its residents from noise, loitering, or cars that park on city streets, these interests cannot conceivably justify a total and categorical ban on short-term rentals outside the city-defined "STR Zone."

The city does not even attempt to defend the constitutionality of Ordinance 19-014 under the *Patel* standard. Instead, the city claims only that Ordinance 19-014 passes muster under the hyper-deferential rational-basis standard, which nearly every law does. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018) ("[T]he Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny."). Rational-basis review is incompatible with the *Patel* standard, because the rational-basis test expressly *allows* states to enact laws that are over-inclusive relative to the state interests they purport

to advance. *See Heller v. Doe*, 509 U.S. 312, 321 (1993) ("[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends."). *Patel*, by contrast, disapproves laws that are overinclusive even when they purport to implement the state's police powers—as it requires courts to pronounce unconstitutional laws that are "unreasonably burdensome" or "oppressive in relation to the underlying governmental interest." *Patel*, 469 S.W.3d at 87.

So the city cannot survive the plaintiffs' constitutional challenge simply by invoking its police powers and demanding that the judiciary defer to its judgments under rational-basis review. *Patel* requires a more searching judicial inquiry, and it requires the city to explain why it must go so far as to categorically outlaw short-term rentals outside the city-approved zone—rather than taking the more measured step of regulating and licensing short-term rentals to prevent nuisance and other harms that the city recites in its brief. Yet the city has not even attempted to explain why a categorical prohibition on short-term rentals is needed to accomplish these goals, either in its brief or at the temporary-injunction hearing.

A total prohibition on short-term rentals outside a city-approved zone is both "unreasonably burdensome" and "oppressive in relation to the underlying governmental interests" that the city asserts. Consider first the city's claim that residents have been forced to endure "excessive noise, profane music, parties at night, trash overflowing into the streets, excess cars parked on neighborhood blocks, and even individuals engaging in fistfights and uri-

nating on front lawns." Appellees' Br. at 4. The city's police powers surely allow it to legislate against these behaviors,[1] but the city makes no attempt to explain why a categorical prohibition on short-term rentals outside a city-defined zone is necessary to prevent these harms—especially when Ordinance 19-022 adopts a far less onerous licensing-and-regulatory scheme to deal with these problems inside the city's designated STR Zone. The observation that *some* short-term rental tenants have been badly behaved or inconsiderate does not justify a categorical prohibition on short-term rentals outside a city-defined zone—especially when the record shows that the plaintiffs and other landlords have ensured that their tenants and guests conduct themselves with appropriate decorum. RR 143. By the city's logic, a municipality could categorically outlaw the practice of law simply by offering evidence that *some* lawyers steal from their clients. *Patel* forbids regulatory overreactions of that sort. *See Patel*, 469 S.W.3d at 87 ("[T]he standard of review for as-applied substantive due course challenges to economic regulation statutes [is] whether the statute's effect as a whole is so unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest.").

The other problems with short-term rentals can be easily addressed with a licensing-and-regulatory regime rather than a categorical prohibition. The city cites testimony from Arlington resident Kari Garcia, who claims that she

1. As it already has. RR 237.

has called the police no fewer than 12 times in response to disturbances caused by short-term renters across the street. 2 RR 250–51. But the city can easily address this problem by revoking short-term rental licenses in response to these complaints, or by issuing rules that prevent short-term renters from disturbing the neighboring community and by holding landlords responsible for their tenants' behavior. A total ban on short-term rentals outside a city-defined zone is both "unreasonably burdensome" and "oppressive in relation to the underlying governmental interests"—and the city has not even argued to the contrary.

II. The City's Decision To Prohibit Owners From Renovating Their Property To Add Bedrooms For Short-Term Rentals Is Unreasonably Burdensome And Oppressive In Relation To The Underlying Governmental Interest

Section 3.15 of Ordinance 19-022 prohibits homeowners from renovating their property to add new bedrooms for use as short-term rentals. This provision, like Ordinance 19-014, fails to satisfy the constitutional standard for economic regulations set forth in *Patel*, as it is both "unreasonably burdensome" and "oppressive in relation to the underlying governmental interest." *Patel*, 469 S.W.3d at 87

There is simply no means-end fit between the renovation restriction in section 3.15 and any of the governmental interests that the city asserts. If the city wants to prevent large numbers of short-term renters from occupying a single dwelling in an effort to deter parties and commotion, then it should

cap the number of occupants per building rather than adopting a renovation restriction. And if the city is willing to allow a landlord to purchase an existing five-bedroom house within the STR zone and use each of those rooms for short-term rentals, then it is difficult to comprehend what governmental interest is served by prohibiting a STR landlord from purchasing a four-bedroom house and then adding a fifth bedroom through renovation. The effects on the neighboring community are no different in these two scenarios, so it is hard to see how the renovation restriction can be characterized as anything other than an "unreasonably burdensome" regulation that is "oppressive in relation to the underlying governmental interest." Indeed, it is hard to comprehend what "governmental interest" could possibly undergird a restriction of this sort.

The city is also content to allow homeowners to add new bedrooms to their houses and then sell their house later to an STR landlord. Here, too, one can only wonder what the city hopes to accomplish by prohibiting renovations made for the immediate purpose of expanding STR bedrooms, while simultaneously permitting renovations that will expand the array of bedrooms available to prospective purchasers of short-term rental properties. Like the licensing scheme disapproved in *Patel*, section 3.15 is too over- and under-inclusive to qualify as a constitutional use of the city's police powers, and clumsily designed regulations of that sort cannot pass muster under the due-course-of-law clause. *See Patel*, 469 S.W.3d at 87 (Tex. 2015).

III. The Plaintiffs Are Entitled To A Temporary Injunction

The plaintiffs have shown that the city's ordinances violate their constitutional rights, and that alone is sufficient to warrant a temporary injunction. *See Iranian Muslim Org. v. City of San Antonio*, 615 S.W.2d 202, 208 (Tex. 1981) ("[A] court has no discretion to deny relief by a temporary injunction where a violation of a constitutional right is clearly established."). The Court should remand for its entry.

Conclusion

The order denying the plaintiffs' motion for temporary injunction should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

/s/ Jonathan F. Mitchell
Jonathan F. Mitchell
State Bar No. 24075463
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940 (phone)
(512) 686-3941 (fax)
jonathan@mitchell.law

Counsel for Amicus Curiae

Certificate of Compliance

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/s/ Jonathan F. Mitchell
Jonathan F. Mitchell
Counsel for Amicus Curiae

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Byron K. Henry
Walker S. Young
Scheef & Stone, L.L.P.
2600 Network Boulevard
Suite 400
Frisco, Texas 75034
byron.henry@solidcounsel.com
walker.young@solidcounsel.com

Counsel for Appellants

Chad Arnette
Whitney D. Beckworth
Kelly Hart & Hallman LLP
201 Main Street, Suite 2500
Fort Worth, Texas 76102
chad.arnette@kellyhart.com
whitney.beckworth@kellyhart.com

Nastasha Anderson
Galen Gatten
Robert Fugate
Cynthia Withers
City of Arlington
City Attorneys' Office
Mail Stop 63-000
P.O. Box 90231
Arlington, Texas 76004
nastasha.anderson@arlingtontx.gov
galen.gatten@arlingtontx.gov
robert.fugate@aringtontx.gov
cynthia.withers@arlingtontx.gov

Counsel for Appellees

/s/ Jonathan F. Mitchell
Jonathan F. Mitchell
Counsel for Amicus Curiae